

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

STATE OF MISSOURI, ex rel. Chris Koster )

Plaintiff, )

vs. )

No. \_\_\_\_\_

U.S. DEPARTMENT OF INTERIOR, )

BUREAU OF RECLAMATION )

1849 C Street N.W. )

Washington, D.C. 20240 )

KEN SALAZAR, )

Secretary of the Interior )

U.S. Department of the Interior )

1849 C Street N.W. )

Washington, D.C. 20240 )

J. WILLIAM MCDONALD, )

Acting Commissioner )

Bureau of Reclamation )

1849 C Street N.W. )

Washington, D.C. 20240 )

U.S. ARMY CORPS OF ENGINEERS, )

Headquarters )

U.S. Army Corps of Engineers )

441 G. Street NW )

Washington, D.C. 20314 )

and )

PETE GEREN, )

Secretary of the Army )

U.S. Department of Defense )

101 Army Pentagon )

Washington, D.C. 20310 )

Defendants. )

*Also serve pursuant to Fed.R.Civ.P. 4(i)(1):* )  
 Jeffrey Taylor, U.S. Attorney )  
 U.S. Attorney's Office )  
 555 4<sup>th</sup> Street NW )  
 Washington, D.C. 20530 )  
 )  
 Eric Holder )  
 U.S. Attorney General )  
 5137 Robert F. Kennedy Bldg. )  
 10<sup>th</sup> St. & Constitution Ave. NW )  
 Washington, D.C. 20530 )

### **STATE OF MISSOURI'S COMPLAINT**

1. The State of Missouri brings this action for preliminary and permanent injunctive and declaratory relief against the United States Department of Interior, the Bureau of Reclamation, and Secretary Ken Salazar and Acting Commissioner J. William McDonald, in their official capacities, the United States Army Corps of Engineers, and Secretary Pete Geren, in his official capacity, for violations of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"); and the Administrative Procedures Act, 5 U.S.C. § 701 et seq. ("APA"), arising out of the Northwest Area Water Supply Project Environmental Impact Statement ("EIS").

2. The State of Missouri depends on the Missouri River for many uses. The River serves as the water supply for approximately one-half of Missouri's 5.9 million citizens. More than half of the water delivered by public water supplies to Missourians is for domestic use. Hundreds of thousands of acres of Missouri farm land are adjacent to or otherwise directly affected by the flow of the Missouri River, particularly when the river rises. Over 1 million acres of Missouri River floodplain is located in Missouri. A substantial portion of that flood plain has been designated prime farm land by the United States Department of

Agriculture. Commercial navigation on the River in Missouri is a multi-million dollar industry, but has suffered in recent years due to a shortened navigation season caused by a lack of available water. The River also has other important commercial, recreational, and fish and wildlife attributes. A number of large Missouri metropolitan areas - including the two largest, St. Louis and Kansas City - are located on the Missouri River.

3. The Northwest Area Water Supply Project (“Project”) will allow the diversion of approximately 15,000 acre feet of water out-of-basin per year, diminishing the flow of water reaching Missouri.

4. Because of Missouri's dependence on the Missouri River, any significant out-of-basin transfer of water, such as the Project, will significantly affect the human environment in Missouri and will cause actual and imminent harm to Missouri citizens.

5. This is a civil action for declaratory and preliminary and permanent injunctive relief to prevent the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers from implementing the Project contrary to federal law.

### **JURISDICTION**

6. This action arises under the Declaratory Judgments Act, 28 U.S.C. § 2201; the APA; NEPA; and the Corps’ Master Manual. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

### **VENUE**

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and (e) and 5 U.S.C. § 703.

### **PARTIES**

8. Plaintiff State of Missouri (“Missouri”) is a sovereign state and brings this action on its own behalf and as *parens patriae* for its residents.

9. Chris Koster is Missouri's duly elected, qualified and acting Attorney General. He is authorized to file this complaint to protect the State's interests.

10. Defendant Salazar is the Secretary of the Interior and is ultimately responsible for the activities of the Bureau of Reclamation including the Project.

11. Defendant McDonald is the Acting Commissioner of the Bureau of Reclamation.

12. The United States Bureau of Reclamation is a part of the Department of the Interior charged with water management. This complaint will refer to Defendants Salazar, McDonald and the Bureau of Reclamation collectively as “the Bureau.”

13. The United States Army Corps of Engineers is charged with the maintenance of the Missouri River channel and control of the river’s main stem dams and reservoirs. 33 U.S.C. § 701-1.

14. Defendant Geren is the Secretary of the Army and is ultimately responsible for the operation of the main stem dams and reservoirs on the Missouri River. This complaint will refer to Defendants Geren and the United States Army Corps of Engineers collectively as “the Corps.”

### **GENERAL ALLEGATIONS**

15. The Bureau is the largest wholesaler of water in the country. Since 1902 it has constructed water projects that promote the economic development of the western United States. There are no Bureau water projects in Missouri or any state to the east.

16. The United States Army Corps of Engineers operates six main-stem Missouri River dams and reservoirs. They are Fort Peck in Montana, Garrison Dam and Lake Sakakawea in North Dakota, Oahe in North Dakota and South Dakota, Big Bend Dam and Lake Sharpe in South Dakota, Fort Randall Dam and Lake Francis Case in South Dakota, and Gavins Point Dam and Lewis and Clark Lake in Nebraska and South Dakota. They are among the largest dams of their design in the world. The Bureau maintains only one relatively-small reservoir on the main-stem of the Missouri River at Canyon Ferry Dam in Montana.

17. Pursuant to the authorities arising under the Flood Control Act of 1944 (“FCA”), the Corps adopted and published a Master Water Control Manual in 1979 for the purpose of operating the main stem Missouri River reservoirs. No affected person appealed the Corps’ adoption of the 1979 Master Manual or any of its provisions. The Corps revised the 1979 Master Manual on March 19, 2004 (“Master Manual”).

18. The 2004 Master Manual establishes certain water conservation measures that require the upstream reservoirs to retain water during times of drought, at the expense of downstream water uses. The amount of water released from the Missouri River reservoirs for downstream uses, such as navigation, is specifically tied to reservoir water level thresholds. Thus, any significant out of basin transfers from these reservoirs, such as the Project, will impact the reservoir levels and thereby could adversely impact the amount of water released to Missouri.

19. Pursuant to the FCA, the Corps is charged with responsibility for maintaining and operating the dams and reservoirs in the Missouri River system for the primary purposes of flood control and navigation. Its actions are governed by the Master Manual.

20. The Bureau is given limited authority under the FCA. This authority does not include authorization of withdrawals from the reservoirs for water supply purposes without Corps authorization. The Corps is specifically granted such authority.

21. The North Dakota Garrison Diversion Conservancy District is a political subdivision of North Dakota, charged by state statute to divert Missouri River water for various uses within the District. N.D. CENT. CODE § 61-24-01.5 (1991).

22. In April 2001, the Bureau, together with the North Dakota Water Commission and the North Dakota Garrison Diversion Conservancy District, issued a Final Environmental Assessment concluding that the Project would not have a significant environmental impact. After the Final Environmental Assessment was issued, the Bureau issued a finding of no significant impact under NEPA. Construction commenced in April 2002.

23. In October of 2002, the Province of Manitoba filed suit in the United States District Court for the District of Columbia challenging the Bureau's compliance with NEPA. On February 3, 2005, the District Court issued its order requiring the Bureau "to complete an Environmental Assessment that considers an integrated analysis of the possibility of leakage and the potential consequences of the failure to fully treat the Missouri River water at its source given the agency's awareness of treatment-resistant biota. After doing so, the agency is **ORDERED** to revisit its finding of no significant impact."

24. Despite this order, the Bureau never completed an environmental assessment. Instead, it prepared a Draft Environmental Impact Statement and a Final Environmental Impact Statement. Neither document considered any alternatives to the Project.

25. On or about January 15, 2009, the Bureau issued its record of decision to proceed with the Project.

26. Upon information and belief, the Corps has never undertaken any NEPA analysis to determine if its action will have a significant impact on the human environment, nor has it issued any record of decision relating to its action authorizing the Bureau to withdraw water from the reservoir under its control.

### **CLAIM**

27. Missouri incorporates by reference and realleges the paragraphs above.

28. 42 U.S.C. § 4332(C), requires that the implementing agency must prepare an environmental impact statement (“EIS”) for any federal action significantly affecting the human environment.

29. The Project is a major federal action significantly affecting the human environment.

30. The Council on Environmental Quality (“CEQ”), created by NEPA, 42 U.S.C. §§ 4341-47, adopted implementing regulations governing the purpose and preparation of an EIS at 40 CFR Chapter V.

31. Pursuant to CEQ regulations, an agency must “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action. 40 CFR §1502.14(a).

32. The Bureau has failed to comply with NEPA by:

A. Failing to consider all reasonable alternatives to the Project in the Draft and Final Environmental Impact Statements;

B. Failing to take a hard look at the environmental impacts of the Project, including the significant impacts on the Missouri River system and those who depend upon it;

C. Failing to exercise reasonable judgment throughout the NEPA process by giving unreasonable deference to the interests of its partner, the Garrison Diversion Conservancy District;

D. Failing to adequately consider the likelihood and impacts of a system failure;

E. Failing to provide adequate opportunity to comment on the Project; and

F. Failing to analyze fully the need for the Project.

33. The Corps has failed to comply with NEPA by completely failing to consider the impact that its decision to allow the withdrawal of water from a reservoir under its control for an out-of-basin transfer will have on the human environment.

34. The Bureau's and the Corps' attempt to comply with the mandates of NEPA is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

35. Missouri does not have any other adequate remedy at law.

36. Missouri will suffer irreparable injury if the Project is allowed to proceed.

WHEREFORE, Missouri is entitled to a declaratory judgment and a preliminary and permanent injunction:



- A. Declaring that the Project is a federal action significantly affecting the human environment;
- B. Declaring that the Draft and Final Environmental Impact Statements do not comply with NEPA;
- C. Declaring that the Corps is required by NEPA and the implementing regulations to prepare an EIS comply with all the requirements of the CEQ regulations prior to authorizing any withdrawal from the Missouri River system for the Project;
- D. Enjoining the Bureau and the Corps from implementing the Project without full NEPA compliance; and
- E. Granting further relief that the Court deems proper.

Respectfully submitted,

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